Behnke, Inc. *and* Local No. 7, International Brotherhood of Teamsters, AFL–CIO. Case 7–CA–33560

April 28, 1994

DECISION AND ORDER

BY MEMBERS STEPHENS, DEVANEY, AND COHEN

On July 26, 1993, Administrative Law Judge William A. Pope II issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Behnke, Inc., Battle Creek, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The Respondent asserts that the judge's finding of antiunion motivation with respect to James Betz' reassignment and subsequent discharge was based solely on legal and protected speech. We do not agree. The judge properly inferred antiunion motivation from circumstantial evidence, including the timing of the Respondent's reassignment of Betz immediately after his support for the Union became apparent by his service as the Union's election observer; the pretextual nature of the Respondent's asserted reasons for reassigning and discharging Betz; and in discharging Betz for violating a unilaterally and unlawfully established more onerous work rule created at the time and first applied to Betz.

We find it unnecessary to rely on the judge's gratuitous remarks at fn. 6 of his decision.

Howard M. Dodd, Esq., for the General Counsel.
Barry R. Smith, Esq., of Kalamazoo, Michigan, for the Respondent.

DECISION

WILLIAM A. POPE II, Administrative Law Judge. This case was tried in Battle Creek, Michigan, on January 19 and 20, 1993. The original charge was filed on August 6, 1992, and the amended charge was filed September 9, 1992.[1] The complaint was issued on September 16, 1992.

[1] All dates are in 1992 unless otherwise indicated.

Background

Behnke, Inc. is an interstate motor carrier located in Battle Creek, Michigan. It employs city drivers, who transport cargo within 100 miles of Battle Creek and are paid on an hourly basis, and over-the-road drivers, who transport cargo beyond 100 miles of Battle Creek and are paid on a mileage basis. Its over-the-road drivers have been represented for collective-bargaining purposes since approximately 1982 by the Charging Party, Teamsters Local 7, and on May 8, 1992, Teamsters Local 7 won a representation election to represent the Company's city drivers. The Union's observer at the election was city driver James Betz, the alleged discriminatee in this case, and the Company's observer was city driver Ron Brown. Teamsters Local 7 was certified as the exclusive collective-bargaining representative of the unit composed of all of Behnke's full-time and regular part-time city drivers and mechanics on May 18, 1992. Bargaining over a contract was still in progress at the time of the hearing in this case. James Betz was selected to be the Union's chief steward, and was a member of the Union's bargaining team.

One of the regular driving assignments performed by Behnke's city drivers is referred to as the Ralston shuttle. Operating under a contract which Behnke has had for approximately 8 years with the Ralston Purina Company (Ralston), Behnke assigns drivers and equipment daily to transport material between a Ralston warehouse and the main Ralston plant in downtown Battle Creek, a distance of approximately 5 miles. Under the terms of the contract, Ralston pays Behnke by the load, and guarantees that Behnke's drivers will not have to wait while Ralston employees load the cargo onto Behnke's trailers. At times, the load requirements set by Ralston require that Behnke drivers work overtime or on weekends. Although Ralston sets the number of trips to be made on a daily basis, the Behnke drivers can affect the time required to complete trips by minimizing delays at the point of origin and the destination, and by minimizing delays en route.

For a period of approximately 2 years, city driver James Betz was the regularly assigned driver to the Ralston shuttle. Beginning in November 1991, however, Behnke began rotating the assignment on a monthly basis between Betz and Ron Brown, another city driver. At the end of the workday on May 8, 1992, the Company terminated Betz' regular assignment to the Ralston shuttle. After May 8, until the Company discharged him on August 4, 1992, Betz was given varying driving assignments, including over-the-road assignments for which he was paid on a mileage basis.

Issues

The complaint alleges that the Respondent, Behnke, Inc., violated Section 8(a)(1) and (3) of the Act on May 8, 1992, by changing the work assignment of duty driver James Betz, because of his activities in support of the Charging Union, and, on August 4, 1992, by terminating Betz' employment for the same reason. The complaint further alleges that Respondent violated Section 8(a)(1) and (5) of the Act by unilaterally changing its sick leave policy, without prior notice to the Union and affording the Union an opportunity to bargain. The complaint was amended at the hearing to show that Betty Behnke is the general manager of Behnke, Inc., Mark

Behnke is its assistant manager, Karl Behnke is its personnel director, and Andy Behnke is a dispatcher.

General Counsel contends that Respondent was opposed to its duty drivers choosing the Charging Party Union as their collective-bargaining representative, and violated Section 8(a)(1) and (3) by retaliating against city driver James Betz for supporting the Union, by changing his work assignment on May 8, 1992, after it learned for the first time that Betz, who served as the Union's observer at an election which the Union had won earlier in the day, was a union supporter, and by discharging him on August 4, 1992, for failing to comply with a directive to go to a hospital or emergency room to verify an illness. General Counsel further contends that Respondent also violated Section 8(a)(1) and (5) by unilaterally changing an unwritten sick leave policy by requiring Betz to go to a hospital emergency room to verify a minor illness.

Respondent argues that General Counsel has failed to show that the Company was motivated by union animus in any of the actions it took in May and August 1992 with respect to its employee, James Betz. Respondent states that it has had a long, productive adversarial relationship with Teamsters Local 7 as representative of its over-the-road drivers, and when Teamsters Local 7 received a majority of the votes cast in a NLRB-conducted representation election among its city drivers and mechanics on May 8, 1992, the Company did not file objections to the election, and the results were promptly certified by the NLRB. There is no evidence of vigorous campaign activity by the Company prior to the election, and no history of union animus by the Respondent.

Respondent asserts that management retains the right to make work assignments as it deems necessary, and it reassigned Betz from the Ralston shuttle to other duties on May 8, 1992, not because of his union activity, but because a study showed that since November 1991, Betz' productivity was lower than that of Ron Brown. According to Respondent the mere coincidence in timing between its reassignment of Betz and his union activities is insufficient to support a finding of unlawful motivation.

With respect to terminating Betz' employment on August 4, Respondent contends that there is clear evidence that the Company has maintained a rule requiring employees to supply medical proof signed by a physician to prove that they were ill and could not work. Its direction to Betz to go to a hospital or emergency room on a weekend was an appropriate application of the rule because it was the only alternative to Betz' unavailable personal physician. Further, the Company had significant reasons for requiring Betz to prove his illness, because it was experiencing resistance by some employees to working on weekends. By August 1, contends the Company, it was justifiably concerned and suspicious of any employee who claimed he was unable to work on a summer Sunday. Finally, Respondent says that notwithstanding Betz' apparent failure to seek medical care on Sunday, August 2, it did not decide to terminate him until August 4, when he indicated that in the future he would still refuse to seek medical treatment during the period of his illness.

I.

The General Counsel has the initial burden of establishing a prima facie case that an employee was discharged or, as in this case, discriminatorily reassigned to other work duties, because of union animus. *Wright Line*, 251 NLRB 1083 (1980), enfd. as modified 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). As part of the prima facie case, the General Counsel must prove that the employee engaged in union or other protected activity, that the employer had knowledge of the protected activity, and that the employee was discharged or reassigned because of union animus or other unlawful motive.

Inference of unlawful discrimination against an employee can be drawn from an employer's hostility toward the union, and coincidence between the employee's union activity and his discharge or job reassignment. *Lemon Drop Inn v. NLRB*, 752 F.2d 323, 325 (8th Cir. 1985). Unlawful motivation can be inferred from the timing of an employer's action. *Lemon Drop Inn v. NLRB*, supra; *T.M.I.*, 306 NLRB 499 (1992); *Dorothy Shamrock Coal Co.*, 279 NLRB 1298 (1986); *Dr. Philip Megdal, D.D.S., Inc*., 267 NLRB 82 (1983); *NLRB v. Del Rey Tortilleria*, 787 F.2d 1118 (7th Cir. 1986), enfd. 823 F.2d 1125 (1987). Union animus can be inferred from circumstantial evidence. *Abbey's Transportation Services v. NLRB*, 837 F.2d 575 (2d Cir. 1988). Another factor from which unlawful motivation may be inferred is the pretextual nature of an employer's asserted reasons for discharging or taking other action against an employee. *T.M.I.*, supra; *Dr. Philip Megdal, Inc*., supra; *Abbey Island Park Manor*, 267 NLRB 163 (1982); *Escambia River Electric*, 265 NLRB 973 (1982), enfd. 733 F.2d 830 (11th Cir., 1984). The Board has held that disparate treatment, such as stricter enforcement of work rules, may constitute ''a strong prima facie showing of discriminatory intent.'' *Huttig Sash & Door Co.*, 300 NLRB 1298, 1299 (1986).

Once the General Counsel has met his burden of establishing a prima facie case of discharge or other discrimination because of union animus, the burden then shifts to the Respondent to show that it would have discharged or reassigned the employee to other duties even in the absence of protected activity. *Wright Line*, supra; *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983); *Huttig Sash & Door Co.*, supra.

II.

I find that the General Counsel has made a prima facie showing that Respondent's action on May 8, 1992, reassigning James Betz from driving the Ralston shuttle to other driving duties, while otherwise within management's discretion, was, under the facts in this case, discriminatory and in violation of Section 8(a)(1) and (3) of the Act, because Respondent's management was motivated by union animus. Respondent has failed to meet its burden of showing that it would have reassigned Betz to other duties even in the absence of his protected union activity.

A. *Employees' Opposition to Union*

There is reliable evidence from which it can reasonably be inferred that Behnke's management opposed representation of the Company's city drivers by a union. The issue of union representation of the city drivers was not a new one in May 1992; the Company had been victorious in a representation election held approximately a year before. City driver James Betz, the alleged discriminatee in this case, whose testimony I find to be credible, said that in the late afternoon of May

7, in the presence of another city driver, Betty Behnke, Respondent's general manager, told him that she did not understand why the city drivers wanted a union, and that she felt that a union was unnecessary because of good communication between the drivers and the Company. Ms. Behnke also stated that if the city drivers selected a union to represent them, they would lose their right to speak for themselves and everything they wanted would have to go through the union. Betty Behnke, who also testified at the hearing as a witness for the Respondent, did not deny Betz' testimony on this point.

B. *Betz' Union Activity and Employees' Knowledge*

Knowledge by the employer of Betz' union activities and support of the Union at the time of the alleged violations of the Act is indisputable. Betz served as Teamsters Local 7's observer at the representation election held at the Company's facility on May 8, and after Local 7 was certified as the bargaining representative of the city drivers he was elected to the post of chief steward, and was a member of the Union's bargaining team. But, while there ample evidence of Betz' open support of the Union at and after the election, there is no evidence in the record that Betty Behnke, or any other member of Behnke's management, was aware of Betz' union activity and support for Teamsters Local 7 until he served as the union's observer at the representation election on May 8 which took place early in the morning in the drivers' room at Respondent's place of business.[2]

C. *Change in Work Assignment of James Betz*

Betty Behnke's behavior immediately after the election on May 8 suggests that she was upset over the outcome of the election and was angry at the city drivers. She admitted that after the election was over, she observed a number of drivers ''hanging around'' while they were on the clock. She said that she took it on herself to tell them to get to work, and she told Betz, who was making a telephone call, to hang up and get going. According to Betz, whose testimony on this point was not denied by Betty Behnke, the telephone call he was making at the time was to Ralston to find out where he was to start the shuttle. He said that Betty Behnke entered the room, grabbed the telephone from his hand, slammed it down, and said that she did not care who he was calling.

When Betz returned in the afternoon of May 8, after completing the Ralston shuttle for the day, he found a note bearing the initials ''MAB,'' which Betz recognized as the initials of Mark Behnke, Respondent's assistant manager, attached to his timecard telling him to remove his car from Behnke's lot by noon, the next day.[3] Mark Behnke testified that employees periodically left inoperable vehicles in the Company's parking lot, and he could have put a note on Betz' timecard telling him to remove his vehicle, but he did not remember putting such a note on Betz' timecard, and the note produced by Betz (G.C. Exh. 2) was not in his handwriting.

That same afternoon, Andy Behnke, Respondent's dispatcher, told Betz that he was off the Ralston shuttle. In response to Betz' inquiry as to why he was being removed from the shuttle run, Andy Behnke replied that Ralston no longer wanted him. After May 8, Betz was sent on over-the-road trips outside of a 100-mile radius of Battle Creek almost everyday. He said that he was paid mileage for the over-the-road assignments, and he calculated that he was making about $125 a week less than he had earned as a city driver assigned to the Ralston shuttle.

Andrew Behnke confirmed that Betz had asked him why he was being removed from the Ralston shuttle, but denied telling Betz that Ralston had complained about Betz. Andrew Behnke stated that after Betz was taken off the Ralston shuttle, he remained a city driver, but Behnke gave him numerous over-the-road assignments. Behnke said that after the election, he was told by management to give Betz over-the-road assignments, but he denied that he was told why.

Having had the opportunity to observe the demeanor of both Andrew Behnke and James Betz as witnesses testifying in this case, I find Betz' testimony to be more credible than of Andrew Behnke. I find that Andrew Behnke's testimony was most strongly motivated by his desire to protect Respondent's interests, particularly in view of his familial relationship to the Company's management. Accordingly, I find that Andrew Behnke did tell Betz that his reassignment was the result of complaints by Ralston. The Respondent having failed to introduce any evidence to corroborate that statement by Andrew Behnke, I find that it was pretextual.

The timing of these actions by Behnke's management, directing Betz to remove his vehicle from the company lot and removing him from his long-time assignment to drive the Ralston shuttle, coming on the same day as the Company suffered a loss in a union representation election, supports a clear inference that they are all connected, and that they were taken against Betz in retaliation for his union activities.

Betz testified that he complained to another dispatcher, named Corky, that he was unhappy with the change in his driving assignments and, apparently in response to this complaint, on Tuesday or Wednesday of the next week, Karl Behnke, Respondent's personnel director, asked what the problem was. Betz then told Karl Behnke how Betty Behnke had acted after the election, about the note attached to his time card, and that Andy Behnke had said he was taken off the Ralston shuttle at Ralston's request. Karl Behnke told Betz that he would look into the matter and, about a week later, he told Betz that Betty Behnke had said she should not have acted that way, and the note related to the Company's efforts to clean up the parking lot.

Mark Behnke, Respondent's assistant manager, said that Behnke, Inc., does not have a policy of guaranteeing specific jobs to individual drivers. In late 1991, after failing to get a rate increase from Ralston, he decided to do a study to determine how the Ralston shuttle could be made more efficient. He said that up until October 31, 1991, James Betz was the regular driver on the Ralston shuttle, but that beginning in November 1991, he began alternating the assignment

[2] Betty Behnke, Respondent's general manager testified that the election took place between the hours of 6 and 7 a.m. James Betz testified that the election was held between 6:30 and 7:30 a.m. I find the one-half hour difference to be irrelevant to any issue in this case.

[3] According to Betz he had left the vehicle in Behnke's lot, with Betty Behnke's permission, for one of Behnke's mechanics to make mechanical repairs on it when he was off duty. Betz said that other drivers had been permitted to leave their personal vehicles in Behnke's lot for as long or longer periods of time. Betz' testimony was not denied by Betty Behnke when she testified as a witness for the Respondent.

to the Ralston shuttle on a monthly basis between Betz and another city driver, Ron Brown. Behnke said that in November 1991 he told Betz about the study, and explained that the Company needed to increase the number of loads carried per hour in order to increase the Company's revenues. Sometime between January and May 1992, he explained the results of the study to Betz.

Betz said that someone, possibly Betty Behnke, had told him that Ron Brown was being assigned to alternate with Betz on the Ralston shuttle, because Betz needed a break. Betz denied having any conversation with Mark Behnke about a study.

Mark Behnke identified Respondent's Exhibit 9 as a comparison based on company records of the number of days worked, average loads per day, average hours per day, and average loads per hour of Betz and Brown between February 1992 and May 1992. For the month of February, during which Betz worked on the Ralston shuttle for 7 days, compared to 23 days worked by Brown, Betz delivered an average of .86 loads per hour and Brown delivered .96. For the month of March, during which Betz worked on the shuttle for 25 days, compared to 3 days worked by Brown, Betz delivered an average of .79 loads per hour and Brown delivered .88. For the month of April 1992, during which Betz worked on the shuttle for 5 days compared to 19 days worked by Brown, Betz delivered an average of .79 loads per hour and Brown delivered .98. For the month of May 1992, during which Betz worked on the Ralston shuttle for 7 days, compared to 14 days worked by Brown, Betz delivered an average of .70 loads per hour and Brown delivered .92.

Mark Behnke denied that Betz was removed from the Ralston shuttle because he had been an observer at the election. Behnke said that the Company had been very cautious before the election about what it did ''to make sure that we didn't discriminate against anyone,'' but that after the election was over, he decided to get back to the business of making money, and put Brown on the shuttle because the Company made more money using him than it did by using Betz.

The evidence presented by the General Counsel raises an inference that Betz' removal from the Ralston shuttle was triggered by his union activity and, more specifically his appearance at the May 8 election as the Union's observer. Respondent's management opposed the Union, and were unaware until the morning of the election that Betz was a union supporter. Betty Behnke appeared to be upset over the Company's election loss, and displayed anger towards Betz after the election process had been completed. When Betz returned from driving the Ralston shuttle on May 8, he found a note on his time card directing him to remove his personal vehicle stored on Respondent's parking lot, and he was told that he would no longer drive the Ralston shuttle. The timing of this series of adverse actions by his employer immediately following his disclosure that he was a union supporter is sufficient to support an inference that the adverse actions, including job reassignment and his union activities, were connected. It is well established that unlawful motivation can be inferred from the timing of an employer's actions, and I find there to have been sufficient evidence presented by the General Counsel to constitute a prima facie showing that James Betz was discriminatorily reassigned to other work duties by his employer, Behnke, Inc., because of union animus and in retaliation for his support of Teamsters Local 7.

The General Counsel having met its *Wright Line* burden, the burden shifts to the Respondent to show that Betz would have been reassigned to other driving duties even in the absence of his protected union activities. I find that Respondent has not met this burden.

Mark Behnke, Respondent's assistant manager, admitted that he made the decision to take Betz off the Ralston shuttle, and advanced as his reason for making that decision that he had conducted a month-long study which showed that another city driver, Ron Brown, performed the Ralston shuttle more efficiently than Betz, and that he had delayed reassigning Betz only until the election was over in order to avoid a charge of discrimination. But, having had the opportunity to observe Mark Behnke's demeanor while testifying, and considering his testimony in the light of other testimony and evidence adduced during the hearing, I find that his testimony is not credible.

Whatever the study conducted by Mark Behnke may indicate, the results of the study were known to him before the assignment to the Ralston shuttle rotated from Ron Brown to Betz on May 1. If there were economic grounds to remove Betz from driving the shuttle, those grounds were known to Respondent on May 1, 7 days before the May 8 election, yet on May 1, Respondent took Ron Brown, supposedly the more efficient of the two drivers, off the Ralston shuttle, and put Betz, supposedly the less efficient driver, back on the shuttle. The question, then, is what happened between May 1, when Betz was assigned to drive the shuttle during the month of May under the established rotation plan, and May 8, when he was suddenly taken off the shuttle. The answer is that on May 8 Mark Behnke first learned that Betz was a union supporter and was engaged in union activity. I find that the economic justification advanced by Mark Behnke is no more than pretextual. The record, in its entirety, clearly shows that Respondent was motivated by union animus in reassigning James Betz from the Ralston shuttle to other duties.

Behnke's management retains the right to unilaterally make driving assignments to its city drivers, and in the abstract, management's decision to reassign Betz to other driving duties was within management's prerogative. However, an otherwise lawful act, done for an unlawful purpose, can be the basis for finding a violation of the Act. Here, Respondent's otherwise lawful Act in reassigning Betz to other driving duties violates the Act because it was motivated by union animus.

III.

I further find that the General Counsel has made a prima facie showing that Respondent terminated James Betz' employment on August 4, 1992, because of union animus and in retaliation for his union activities. I also find that General Counsel has shown that Respondent unilaterally changed or implemented a work rule concerning sick leave, without prior notice to the union or affording it an opportunity to bargain.

The events leading up to Betz' discharge are largely undisputed. He was not scheduled to work on Saturday, August 1, 1992, but he was scheduled to report for work on the morning of Sunday, August 2, and on Monday, August 3. Between 7:30 and 8:30 p.m., August 1, Shirley Cammauf, Betz' mother-in-law, placed a telephone call to Respondent's facility, and reported to Mark Behnke that Betz was ill and

would not be coming to work on Sunday, August 2. Behnke admits that he told her that Betz had to see a doctor at a hospital to verify that he was ill. On the morning of August 2, Jackie Betz, James Betz' wife, called Respondent twice, and spoke to Mark Behnke each time. In the first call, about 6:45 a.m., she reported that James Betz was ill and would not be coming to work that day. Mark Behnke admits that he told her that Betz had to see a doctor at a hospital to verify his illness. Mrs. Betz called a second time on August 2, about 8 a.m., and again spoke to Mark Behnke, who admits that he told her that Betz' employment would be terminated unless Respondent received documentation from a doctor at a hospital.[4] There is no disagreement that James Betz did not go to a hospital to see a doctor on Sunday, August 2, or on Monday, August 3. On Tuesday, August 4, when he next reported to work, he met with Betty, Mark, and Karl Behnke. During that meeting, Mark Behnke discharged Betz because he had not gone to a hospital emergency room or to a hospital to see a doctor in order to have his illness verified.

James Betz testified that he had a fever and a sore throat on Saturday, and through his mother-in-law and his wife, who made telephone calls at his request, notified Respondent that he was ill and would be unable to work on Sunday, August 2. He said he had a fever most of the day on Sunday, August 2, and was still feeling ill on Monday, August 3. He admitted that he knew that Mark Behnke had instructed his mother-in-law and his wife that he was to have his illness verified by a doctor at a hospital, but he did not know that Mark Behnke would be satisfied with only that, and would not be satisfied with a doctor's certificate from a doctor who was not associated with a hospital.[5] He stated that he heard his wife tell Mark Behnke (he heard only his wife's part of the telephone conversation) that he would see a doctor sometime on Monday, August 3, and that his wife made an appointment for him to see their family doctor the next day, August 3. He also admitted that he did not comply with Mark Behnke's instructions to seek medical attention at a hospital or hospital emergency room, but on Monday, August 3, he was examined by the family doctor, who gave him a disability certificate stating that he was totally incapacitated from August 2 to August 4, and that he could return to work on August 4. General Counsel's Exhibit 3 is a copy of the disability certificate, dated August 3, purportedly signed by W. E. Frankenstein, D.O.

According to Betz, during the afternoon of Monday, August 3, he spoke by telephone with Corky Singer, Respondent's dispatcher, and told Singer that he had a doctor's slip to return to work the next day. After asking Betz to hold for a moment, Singer came back on the line and informed Betz that Betty Behnke wanted a meeting with him. Karl Behnke then came on the line, and Betz repeated, in response to Behnke's question, that he had a doctor's slip. Karl Behnke told him to bring the slip the next day and that the meeting with Betty Behnke would be at 9:30 a.m. Behnke told Betz that after the meeting, he would be dispatched on a trip so that he did not lose an entire day's pay. Betz related that he arrived at Respondent's facility at 9:25 a.m., on Tuesday, August 4, and spoke with Karl Behnke in person. Behnke asked if Betz had the doctor's slip, but declined to take it from Betz when the latter replied in the affirmative and offered it to him. Behnke then took Betz to Betty Behnke's office.

Initially, Betz said, he met with only Betty Behnke and Karl Behnke in Betty Behnke's office. According to Betz, Betty Behnke told him that while she was not saying she did not believe him, the Company had been experiencing a problem with drivers calling off on weekends, and she did not always believe that they were sick. She said that the Company's policy required drivers to call in sick 1 hour before work, and the second part of the Company's policy required drivers who missed work because of illness to have a doctor's slip to return to work. According to Betz, he said he did have a doctor's slip, and pulled it out. Mark Behnke, who had entered the room by this time, said that was not good enough, and that he did not believe Betz, and that was why he told Betz' spokespersons that he wanted Betz to prove his illness by going to the hospital or a doctor. According to Betz, Mark Behnke then said that Betz was terminated, and escorted him out. Betz said that no one would accept the doctor's certificate which he had brought with him.

Respondent's 1992 attendance record for James Betz (R. Exh. 10) shows that he was absent from work because of sickness on April 12 (a Sunday), and May 11 through 15 (Monday through Friday). The exhibit also shows that Betz was absent on Monday, January 1, and Friday, July 3, because of an out-of-plant accident to himself or his family. Betz testified that he was off for 5 days in May 1992 to have a hemorrhoid operation, but that with Betty Behnke's permission, he used his vacation time to cover his absence. Betz' 1991 attendance record (R. Exh. 3) shows that he missed 1 day in April 1991 for sickness, 9 days in July 1991, and 12 days in December 1991. He provided doctors' certificates to Respondent covering his July and December 1991 absences.

Betz testified that he had never seen a written statement of the Company's policy regarding sick time. When asked for the basis of his knowledge of company rules concerning this subject, he said: ''Experience, speculation, in part. Or perhaps the employer had told [me].'' He said that if his employer did tell him at some point that he needed a doctor's slip when he came back from an illness, ''then it has not been a problem. I have done it.''

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[4] Each side accused the other of being rude at some point during these three telephone conversations. I find it unnecessary for purposes of my decision to find who was the more rude or who sorted the lack of activity. For purposes of my decision, I note that by this time the relationship between Betz and his employer had deteriorated to the point of open hostility. Betz clearly did not want to call in to the company, himself, although there has been no convincing evidence that he was incapable of doing so, and instead had his wife and mother-in-law make the calls for him. Mark Behnke, for his part, while claiming that Betz' wife was rude to him, and hung up on him, admitted that he asked her twice if she understood English when she indicated her husband was not going to go to a hospital. What is clear is that each side used the telephone to draw battle lines which had little to do with whether or not Betz was actually ill.

[5] In a minor testimonial discrepancy, Jackie Betz, James Betz' wife, said that she told her husband that Mark Behnke had said that he had to go to a hospital emergency room, and a doctor's slip was not acceptable. That discrepancy is irrelevant. The issue is not why Betz did not go to a hospital on Sunday, August 2, to have his illness verified, but whether or not the employer acted lawfully in ordering him to go to a hospital in the first place. If the order, which Mark Behnke admits was given, was not lawful under the circumstances, discharging Betz for not obeying the unlawful order was also unlawful, regardless of Betz' reasons for not obeying it.

The General Counsel called five more city drivers to testify concerning their knowledge of Respondent's sick leave policy and practices. William L. Martin, a city driver for Respondent for over 5 years, said that he had never seen a written company rule concerning its sick leave policy. He said that he been absent for 1 day 2 years ago because of illness, and had been absent on another occasion for 3 to 4 days after hurting his back. Although on one of the occasions the dispatcher told him to bring a doctor's certificate, he did not visit a physician and returned to work without a medical certificate. Mark Behnke told the dispatcher to put Martin back to work without a medical certificate. Martin said he has never been told to go to a hospital emergency room.

Troy Oliver, a city driver for over 2 years, has been absent because of illness on five to six occasions. He said he sometimes brought in a doctor's certificate, and sometime did not. He said he was only asked for one on a couple of occasions. On one occasion, Betty Behnke wanted a medical certificate when he took a Saturday off because his child was sick. On another occasion, he told Betty Behnke he was not going to go to a doctor for a 1-day illness. He said that he was ''written up'' for Saturday absences, a couple of which were the result of illness, and a couple of which were because he had already worked 55 to 56 hours that week. Oliver said that he has never seen a company rule book, but he knows that drivers have to call in on the first day of absence, and have to go to a doctor for a 1-day illness. He said he sometimes did not do that, and was not fired. He said he has never been told to go to a hospital emergency room.

Anthony Phillips, a city driver for 19 months, has been absent because of illness on three to five occasions. He has never seen anything in writing concerning the Company's sick leave policy. He said that on one occasion he had asked another driver what the Company's policy was. On occasion he has turned in medical certificates, even though he was not asked for one, and on other occasions he did not provide a medical certificate and was not asked for one. He said he had never been ordered to go to a hospital. Although he did not have an understanding that the Company required a medical certificate, on occasions he turned in certificates to ''protect'' himself.

Leeman Borden, a city driver for 17 months, has been off because of illness only once, for one day. He said he did not provide a medical certificate, and was not asked for one. He said he was not told to go to an emergency room to verify his illness in order to return to work, and had never heard of that happening to anyone other than Betz.

Jeffrey Evans, a city driver for 5 years, has called in sick two to three times. On the last occasion, in November 1991, he was off 1 day, and did not furnish a medical certificate nor was he asked for one. On another earlier occasion, he was told by Betty Behnke that he needed a medical certificate for a 1-day absence. He did not have a certificate when he returned to work the next day, and did not obtain one until 2 or 3 days later when he was able to get a doctor's appointment. Evans said that he had never seen written company rules concerning its sick leave policy, and was never instructed to go to a hospital emergency room to have an illness verified, and had never heard of anyone other than Betz being required to do so.

I find that the General Counsel made a prima facie showing that James Betz was discriminatorily discharged because of Respondent's union animus. The General Counsel has shown that Respondent had already discriminated against him in his job assignment because of his union activities in May 1992. After the election, Betz continued to be active in union activities as the Union's chief steward and a member of its bargaining team. There had been one or more bargaining sessions, but a contract had not been reached by the time he was discharged. The union animus shown by Respondent in May 1992 carries over to its actions in discharging Betz in August 1992.

The General Counsel has also offered evidence sufficient to show that if Respondent had any work rule concerning absences because of illness, it was no more than a loosely enforced rule that was observed as much in the breech as in the compliance and required only that a driver who called in sick produce a medical certificate when he returned to work. The General Counsel's case includes evidence that James Betz produced a medical certificate attesting to his illness, that Respondent had not demanded that other employees who became ill on a weekend go to a hospital to seek a doctor to verify their illnesses, and that Respondent's treatment of Betz was disparate because other employees had not been fired for failing to comply with such a directive.

The General Counsel having met its burden of showing a prima facie case of unlawful discrimination, the burden shifts to Respondent to show that it would have discharged Betz even in the absence of his protected union activity.

In its effort to meet its burden in this regard, Respondent relies on the testimony of Betty Behnke and Mark Behnke. Betty Behnke, Respondent's general manager, testified that she was unaware that any decision had been made to discharge Betz before she met with him in her office on August 4. She testified that she told Betz the Company was concerned because he had a long history of illness, and wanted him to get immediate medical attention. She said that Betz responded that the Company did not have the right to tell him when to go to see a doctor. She said that the Company provides medical insurance for its employees. She said that at about that point, her son, Mark Behnke, Respondent's assistant manager, entered her office, and took over the meeting.

Mark Behnke said that he was concerned about Betz' absences in 1991, and said that he wanted him to see a doctor immediately when he got sick so the Company could get him back to work without further loss. He said that the Company provided medical coverage for its employees as a self-insurer, and that it is Respondent's policy to require a doctor's slip from employees who miss work because of illness. He said that the purpose of the rule is to verify the illness. He said that he told Betz that when a driver calls in sick, the Company has to find a replacement and it may be costly to the customer because the driver who shows up may not be familiar with the job.

Behnke said the Company had been having problems with assisting drivers to work on weekends, and that on a prior weekend, Betz had refused to work on a weekend claiming he had already worked the maximum number of hours allowed for 1 week. Behnke said that issue was clarified for Betz. He said he had been concerned when Betz' mother-in-law, and then his wife, called to report Betz' illness, because it was not normal procedure for an employee to have someone else call in for him. Behnke said that he questioned

whether Betz was, in fact, ill, and that he had asked for verification of the illness from a doctor at a hospital so that he would know that Betz was sick. He said that he told Betz' wife that unless the Company received documentation from a doctor at a hospital, Betz' job would be terminated.

According to Behnke, at the meeting on August 4, Betz told him that he could not get in to see a doctor until Wednesday (the next day), and did not produce a medical certificate. Behnke said that he had not made a decision prior to the meeting to discharge Betz, but that when Betz said three times that no one was going to tell him to see a doctor, he unilaterally made the decision to discharge him. He said that he felt that Betz was not trying to work with the Company.

Behnke said that he had told another employee to go to a hospital to have an illness verified on the same day he gave that instruction to Betz' wife. He recalled that about a month before he had told another employee to go to a hospital to verify an illness, but that the employee had elected to come to work instead. However, Respondent did not call either of these drivers as a witness, or make a showing that they were unavailable to testify. Nor did Respondent question Betty Behnke, who did testify as a witness for Respondent, about other instances in which it may have placed a similar requirement on other city drivers. Moreover, even if the two incidents mentioned by Mark Behnke occurred, they were isolated and are insufficient to establish a bona fide work rule.[6] There is in this regard a clear showing in the record that Betz was treated disparately when Mark Behnke terminated his employment, ostensibly because he did not go to a hospital on Sunday, August 2, to have his illness verified by a doctor.

Having had the opportunity to observe the demeanor of James Betz, Mark Behnke, and Betty Behnke as they testified, as well as the opportunity to weigh the testimony of each in light of the extent to which their testimony is corroborated or not corroborated by the testimony of other witnesses or other evidence in this case, I conclude that Betz is the more credible witness. His testimony concerning his illness is corroborated by that of his wife and mother-in-law, both of whom I find to be credible witnesses. Both of them attested to Betz' illness, and his wife communicated Betz' intention to visit a doctor on Monday, August 3, to Mark Behnke.

I find that Mark Behnke was not being truthful when he testified that he had made no decision to discharge Betz until August 4, when Betz allegedly said no one was going to tell him when to see a doctor. Behnke admitted that he had told Mrs. Betz on the morning of August 2 that unless her husband went to a hospital that day to have a doctor verify his illness, Respondent would terminate his employment. It is uncontested that Betz did not go to a hospital as instructed by Mark Behnke. All that remained was for Mark Behnke to carry out his threat, which he did on August 4.

[6] It is worth noting that even if such a work rule existed, its reasonableness and appropriateness are open to question. A hospital and its emergency room are acute care facilities, intended to provide urgently needed care for persons acutely ill. It is not a proper use of an acute care facility to provide verification to a suspicious employer that one of its employees is suffering from a minor illness, such as a fever and sore throat.

Betty Behnke's limited testimony on the meeting in her office on August 4 does little to buttress the testimony of Mark Behnke in any material respect. While she testified that Betz said on August 4 that the Company did not have the right to tell him when to see a doctor, I find that even if he made that statement, it must be viewed in the context of the dispute between Respondent and Betz over Mark Behnke's demand that he go to see a doctor at a hospital on Sunday. There was no reason for Betz to refuse generally to see a doctor when he was ill, particularly since he had gone to see a doctor before the August 4 meeting. It is undisputed Betz had furnished doctor's certificates in the past, and there is credible evidence that, in fact, he visited his family doctor on Monday, August 3, which was the earliest reasonable opportunity that he would likely have had to see a doctor in private practice for a minor, nonlife threatening illness, and the doctor provided him with a disability certificate on that date. It makes no sense that he would have made an issue out of seeing a doctor when he had already complied with the requirement, and had a medical certificate excusing his absence.

General Counsel's Exhibit 3 is a disability certificate dated August 3, 1992, bearing the name and purported signature of W. E. Frankenstein, D.O. Respondent has offered no evidence W. E. Frankstein is not who he purports to be, or that he did not sign the certificate on the date shown, August 3, or that he falsified his certification that Betz was totally incapacitated from August 2 to 4, when he was authorized to return to work. General Counsel's Exhibit 3 refutes Mark Behnke's attempts to discredit the genuiness of Betz' claim to having been ill on Sunday, August 2. Respondent has offered no testimony from a medically qualified witness to discredit Betz' claim that he was ill, as substantiated by Dr. Frankenstein's certificate. Accordingly, I find as fact that General Counsel's Exhibit 3 is genuine and that Betz was medically disabled from working on August 2 and 3.

I do not credit Mark Behnke's testimony that Betz said that he could not get an appointment to see a doctor until the next day, and did not produce a medical certificate on August 4, 1992, at the meeting in Betty Behnke's office. As between Betz and Mark Behnke, I find that Betz is the more credible witness, and I credit his testimony that he offered the medical certificate to Mark, Betty, and Karl Behnke on August 4, before he was discharged. Although Mark Behnke denied Betz' testimony on this point, Respondent failed to call Karl Behnke, to whom Betz said he offered the certificate before the meeting in Betty Behnke's office on August 4, which Karl Behnke attended. Respondent had made no showing that Karl Behnke was unavailable as a witness at the hearing, and Respondent did not question Betty Behnke, who did testify as its witness for Respondent at the hearing, on whether or not Betz produced a doctor's certificate. From these failures, I conclude that if Karl Behnke had been called to testify and Betty Behnke had been examined on this point they would have supported the testimony of James Betz.

Considered in it entirety, the credible evidence of record shows that Respondent was motivated by union animus and that it treated James Betz disparately when Mark Behnke terminated his employment on the pretext that he had failed to comply with a nonexistent company rule requiring employees to go to a hospital to verify even a minor illness when they called in sick on weekends. Accordingly, I find that Re-

spondent violated Section 8(a)(1) and (3) of the Act by discharging James Betz on August 4, 1992.

IV.

The evidence of record clearly shows that if Respondent had a work rule concerning sick leave prior to certification of Teamsters Local 7 as the collective-bargaining agent of its city drivers, it was an unwritten rule which required that a driver who called in sick had to produce a medical certificate when he returned to work, even if the absence lasted only 1 day. General Counsel's city driver witnesses testified they had never seen a written company rule concerning sick leave, and the Respondent offered no evidence to rebut their testimony. But, even assuming that the Respondent had a work rule requiring drivers to produce a medical certificate when they returned to work after an absence of 1 day or more, it did not consistently enforce it. There is persuasive evidence that in practice, Respondent requested doctor's slips from some employees, but not from others, and took no further action against employees who failed to produce one when requested to do so.

In this case, the Respondent attempted to create a new and more onerous work rule, with the harsh penalty of discharge for violating it, where no such rule had existed before. There is no credible evidence that prior to the time Teamsters Local 7 was certified as the collective-bargaining representative of Respondent's city drivers in May 1992, Respondent had a work rule, written or unwritten, requiring employees calling in sick on weekends to go to a hospital or hospital emergency room to have their illness verified, the penalty for violation of which was termination of employment. Six city driver witnesses, including the alleged discriminatee, testified that they were unaware that such a rule existed. In support of its position that such a rule did exist, Respondent, through its witness Mark Behnke, whom I have found to be not credible, could cite only two other applications of the alleged rule, one on the same day, and the other a month before, both of which occurred after Teamsters Local 7 was certified. On the evidence of record, I find that the rule requiring an employee to obtain verification from a doctor at a hospital of any illness occurring on a weekend was a new work rule created by Mark Behnke expressly for the purpose of retaliating against employee James Betz for engaging in protected union activities.

The Respondent's attempt to unilaterally create and implement a more onerous rule and enforce it against employee James Betz on August 4, 1992, at a time when Teamsters Local 7 and the Respondent were engaged in bargaining over a collective-bargaining agreement, violated Section 8(a)(5) and (1) of the Act. As correctly noted by the General Counsel, citing *Equitable Gas Co*., 303 NLRB 925, 929 (1991), and *Southern Florida Hotel Assn*., 245 NLRB 561, 567–568 (1979), enfd. in relevant part 751 F.2d 1571 (11th Cir. 1985), the law on this point is settled. ''An employer violates Section 8(a)(5) of the Act if, during the term of a collective-bargaining agreement, it implements, without first having bargained with its employees' collective bargaining representative over the matter, changes in its employees' work rules.'' *Southern Florida Hotel Assn.*, supra at 567. The rule is no different whether an employer unilaterally implements a change in a work rule during the term of a collective-bargaining agreement, or while the union and the employer are attempting to negotiate their first collective-bargaining agreement after certification of the union as the employees' collective bargaining representative. Further, there is no evidence that Teamsters Local 7 waived its statutory right to bargain over this change in the terms and conditions of employment of the employees it represents. *Equitable Gas Co*., supra at 929.

The Board has said that the test for determining whether a discharge violated Section 8(a)(5) of the Act is: ''If an employer's unlawfully imposed rules or policies were a factor in the discipline or discharge, then the discipline or discharge violated Section 8(a)(5) of the Act.'' *Equitable Gas Co*., supra at 931. Here, the complaint alleges that the implementation of the new rule violated Section 8(a)(5), and the Respondent admits that employee James Betz was discharged pursuant to the new rule. By implementing the new rule without prior notice to Teamsters Local 7 and affording it an opportunity to bargain, Respondent violated Section 8(a)(5) of the Act. Therefore, the discharge of employee James Betz on August 4, 1992, pursuant to the new rule, also violated Section 8(a)(5) of the Act.

CONCLUSIONS OF LAW

1. At all material times since May 18, 1992, Local No. 7, International Brotherhood of Teamsters, AFL–CIO has been the exclusive collective-bargaining representative of Respondent's regular full-time city drivers and mechanics.

2. By changing the work assignment of employee James Betz on May 8, 1992, and terminating his employment on August 4, 1992, because he engaged in protected union activities and supported Teamsters Local 7, and by unilaterally promulgating a work rule requiring employees who missed work on weekends because of illness to go to a hospital for the purpose of having their illness verified, the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1), (3), and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having unlawfully and discriminatorily changed the work assignment of city driver employee James Betz on May 8, 1992, and unlawfully and discriminatorily discharged him on August 4, 1992, it shall be ordered to offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from date of the change in his work assignment to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent having unlawfully and unilaterally implemented a network rule on August 4, 1992, it shall be ordered to rescind the new work rule requiring employees who call in sick on weekends to go to a hospital to obtain verification of their illness.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[7]

ORDER

The Respondent, Behnke, Inc., Battle Creek, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Changing the work assignment or terminating the employment of employees because they supported Local No. 7, International Brotherhood of Teamsters, AFL–CIO or any other union.

(b) Unilaterally implementing and enforcing changes in work rules, including a work rule requiring its city drivers and mechanics who call in sick on weekends to go to a hospital to have their illnesses verified.

(c) In any like or related manner interfering with, restraining, or coercing unit employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Offer city driver employee James Betz immediate and full reinstatement to his former job as a driver on the Ralston shuttle or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(b) Rescind the August 4, 1992, work rule requiring employees who call in sick on weekends to go to a hospital to have their illnesses verified.

(c) Remove from its files any reference to the unlawful job reassignment and discharge of James Betz, and notify the employee in writing that this has been done and that the reassignment and discharge will not be used against him in any way.

(d) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its facility in Battle Creek, Michigan, copies of the attached notice marked ''Appendix.''[8] Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees, are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT change your job assignment or discharge or otherwise discriminate against you for supporting Local No. 7, International Brotherhood of Teamsters, AFL–CIO or any other union.

WE WILL NOT unilaterally and without bargaining with Local No. 7, International Brotherhood of Teamsters, AFL–CIO institute, implement, and enforce work rules, including a work rule requiring employees who call in sick on weekends to go to a hospital to have their illnesses verified.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the right guaranteeds you by Section 7 of the Act.

WE WILL offer James Betz immediate and full reinstatement to his former job as driver on the Ralston shuttle or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and WE WILL make him whole for any loss of earnings and other benefits resulting from his job reassignment and discharge, less any net interim earnings, plus interest.

WE WILL rescind the work rule which we put into effect on August 4, 1992, requiring employees who call in sick on weekends to go to a hospital to have their illnesses verified.

WE WILL notify James Betz that we have removed from our files any reference to his job reassignment and his discharge and that the job reassignment and discharge will not be used against him in any way.

BEHNKE, INC.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''